Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PLUMBERS AND PIPE FITTERS
LOCAL UNION NO. 32, UNITED ASSOCIATION
OF JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA, AFL-CIO,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this case the NLRB held that a union violated its duty of fair representation in the course of administering a hiring hall. There was no claim of discrimination based on union membership or activity. The first question is whether the NLRB had jurisdiction to hear the case.

2. In O'Neill, a fair representation case growing out of negotiations, the Court said that any "substantive examination of a union's performance . . . must be highly deferential. . . ." 499 U.S. at 78. The second question is whether the "highly deferential" standard adopted in O'Neill applies to a claim that the union breached its duty of fair representation in the course of administering a hiring hall.

3. In the event the first two issues are resolved against petitioner, a third question arises; namely, did the Petitioner, in the circumstances of this case, violate its duty of fair representation because it failed to use "objective criteria and standards in referring applicants for employment . . . ."

LIST OF INTERESTED PARTIES

The names of all parties to the proceeding appear in the caption of the case. Neither party has a parent company or subsidiary.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Plumbers and Pipe Fitters Local Union No. 32, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Local 32) petitions for a writ of certiorari to review the judgment of the United States

Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the court below is reported at 50 F.3d 29 and is reproduced in the Appendix to the Petition (App.) at pages 1 - 31. The decision and order of the National Labor Relations Board (Board) are reported at 312 NLRB 1137 and appear at Appendix pages 33 - 34.

JURISDICTION

The judgment of the court below was entered on March 29, 1995. A petition for rehearing was filed on May 8, 1995 and denied on June 7, 1995. (App. p. 32) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 7, 8(a)(3), 8(b)(1), (2), 8(f) and 9(a) of the National Labor Relations Act as amended, 28 U.S.C. Sec.

141 et seq. (NLRA) are reproduced in the Appendix at pages 79 - 85.

STATEMENT OF THE CASE

Michael Flowers and William Harper (Charging Parties) filed unfair labor practice charges against Local 32. The charges allege that Local 32 "failed to dispatch [them] for arbitrary, capricious and invidious reasons." (R. 5-6)[1] An unfair labor practice complaint issued alleging that Local 32 "failed in its duty of fair representation." (R. 12) No other unfair labor practice was alleged. (R. 13, 262) The NLRB General Counsel did not contend that Local 32 "discriminated against [Charging Parties] but rather that the arbitrary nature of the selection process breached the Union's duty of fair representation . . . ." (App. p. 47)

1. "R.___" refers to the joint deferred appendix filed in the court below.

The Administrative Law Judge (ALJ) in his post-trial decision concluded that Local 32 violated the NLRA "by failing to use objective criteria and standards in referring applicants for employment as rig welders . . . at the Longview, Washington job site." (App. p. 56) The Board affirmed pro forma. (App. p. 34) The court below granted the Board's petition for enforcement (App. p. 31) and denied Local 32's petition for rehearing. (App. p. 32)

The evidentiary facts are not in dispute. Local 32 maintained hiring lists for construction and maritime work but not for pipeline work (App. p. 41). There had been no pipeline work in the Local 32 area during the two years preceding the commencement of the Longview job. Ibid.

Pipeline work is controlled under a national agreement between the International Union and a national association of pipeline contractors. (App. p. 71) Local 32 was anxious to protect its jurisdiction over this work. Counsel stipulated that Local 32 therefore "had an interest in dispatching competent and reliable rig welders to the job." (App. p. 65) To this end, Local 32 "accumulated the names of individuals who were good at this work, reliable, and did not have drinking or drug-related problems." (App. p. 66)

To locate competent and reliable rig welders, Local 32 contacted other locals both within and outside the state of Washington and relied upon recommendations from business managers in other locals. (App. pp. 65-66) It also considered applicants who had contacted

Local 32 after learning about the job through trade publications or the sophisticated word-of-mouth network existing among pipeline welders. (App. p. 67)

Local 32 made a total of 15 rig welder dispatches to the Longview job (R. 341-343). It did not maintain or use a first-in, first-out system. (App. p. 67-68) The results were as follows: (a) two qualified members of Local 32 were dispatched but did not pass the welding test. Hence, no "members of [Local 32] worked as welders on the job" (App. p. 46-47); (b) no rig welders from the state of Washington were dispatched (App. p. 47); (c) five rig welders out of the total of the 15 dispatched were from Bakersfield, California Local 460 (R. 339-342) -- Charging Party Flower's home local union. (R. 151)

The ALJ held that a union acts unlawfully if it operates a hiring hall without establishing and following "objective standards". (App. p. 49) On the facts he concluded that "[w]hile the record shows that [Local 32 agents] Manning and Galloway attempted to refer only qualified and dependable welders, at best a subjective test was used." (App. p. 51) Hence, he concluded Local 32 violated the NLRA "by failing to use objective criteria and standards in referring applicants for employment as rig welders." (App. p. 56) The Board affirmed without comment. (App. pp. 33-34)

Neither the ALJ nor the Board addressed Local 32's contention that the Board lacks jurisdiction over fair representation claims absent evidence of discrimination on account of union

membership or other protected activity. Neither the ALJ nor the Board addressed Local 32's claim that in fair representation cases, the "highly deferential" standard of review adopted in Airline Pilots v. O'Neill, 499 U.S. 65, 78 (1991) was controlling.

The court below addressed these issues, rejecting both. As to the authority of the Board, the court below said that this Court's decision in Vaca v. Sipes, 386 U.S. 171 (1967) decided the issue. (App. pp. 12-14) Rejecting Local 32's argument that the O'Neill "highly deferential" standard applied, the court below held that "a high standard" applied to union conduct when administering a hiring hall (App. p. 23) and "[a]bsent clear instructions from the Supreme Court, we decline to weaken this principle." (App. p. 24)

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN AIRLINE PILOTS V. O'NEILL, 499 U.S. 565 (1991).

Certiorari was granted in O'Neill "to clarify the standard that governs a claim that a union has breached its duty of fair representation in the negotiation of a back to work agreement terminating a strike." 499 U.S. at 67. The Court held "that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." 499 U.S. at 67. Given this standard, any "substantive examination of a union's performance must be highly deferential . . . ." 499 U.S. at 78.

The court below acknowledged this Court's statement that the "duty of fair

representation . . . applies to all union activity" including "instances in which a union . . . operates a hiring hall." (App. pp. 18-19) Nonetheless, the court below rejected O'Neill because a union operating "a hiring hall has assumed the role of an employer . . . ." (App. p. 22) How a union establishes itself as an "employer" by referring job applicants to a contractor who may or may not -- at his discretion[2] -- hire such workers is not explained. Nor did the court below attend to the fact that its linchpin

2. The applicable contract states (App. p. 72):

> "(G) the conditions to be followed in the initial hiring or replacement of employees are:
>
> (1) employer retains the right to reject any job applicant and may exercise the right before the union dispatches any employees required by employer. Upon request, employer will confirm by letter or telegram any verbal rejections made.

analogy was considered and rejected in Breininger v. Sheet Metal Workers, 493 U.S. 367 (1989). There the Court said (pp. 87-88):

> [The union] insists that petitioner has failed to state a [fair representation] claim because in a hiring hall setting, the union is acting essentially as an employer . . . .
>
> We cannot accept this proposed analogy. * * * That the particular function of job referral resembles a task that an employer might perform is of no consequence. The key is that the union is administering a provision of the contract, something that we have always held is subject to the duty of fair representation. (emphasis added)

In short, the union hiring hall equals employer status analogy adopted by the court below (App. p. 22) to avoid applying the "highly deferential" O'Neill standard does not survive Breininger. The analogy ignores the record: the contractor retained "the right to reject

any job applicant." (App. p. 72). The analogy fails.

In O'Neill, this Court said "the announced rule in Vaca . . . applies to all union activity", 499 U.S. at 67, including the operation of a hiring hall. 499 U.S. at 77. In O'Neill a "highly deferential" standard was adopted. The Court in O'Neill rejected the notion that different rules -- "a double standard" -- should be applied depending on the conduct under review. 499 U.S. 77. The court below refused to follow O'Neill and for this reason the petition should be granted.

II. THE OFTEN MOOTED ISSUE OF BOARD JURISDICTION OVER FAIR REPRESENTATION CLAIMS, UNRELATED TO DISCRIMINATION BASED ON UNION MEMBERSHIP, IS SQUARELY PRESENTED BY THE RECORD IN THIS CASE AND SHOULD BE DECIDED.

As noted earlier, this hiring hall case involves an unadorned fair

representation claim. Discrimination on account of union membership was not alleged, tried or found to be present. Whether in such cases the Board has "fair representation" jurisdiction is a question which this Court has reserved on five occasions. In DelCostello v. Teamsters, 462 U.S. 151, 170 (1982), the Court wrote:

> The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices. E.g. Mirand Fuel Co., 140 NLRB 181 (1962) enf. denied 326 F.2d 172 (C.A. 2 1963). We have twice declined to decide the corrections of the Board's position[22] and need not address that question today. (Emphasis in original)
>
> 22. Vaca, supra, at 186; Humphrey, 375 U.S. at 344; see Mitchell, 451 U.S. at 67-68 n.3 (Stewart, J., concurring in the judgment).
>
> Accord: Ford Motor Co. v. Huffman, 345 U.S., 332 n.4 (1952); Plumbers Union v. Borden, 373 U.S. 690, 696 n.7 (1962).

The issue reserved in Borden, DelCostello, Huffman, Humphrey, and Vaca obviously is a recurring one.

The "NLRB's tardy assumption of jurisdiction" over fair representation cases (Vaca, 386 U.S. at 138) is "significant in determining whether such power was actually conferred." Trade Comm'n v. Bunte Bros., 312 U.S. 349, 352 (1940). Unlike the Federal Labor Relations Act, 5 U.S.C. § 7114(a)(1) (App. p. 86) which is applicable to governmental employees, the NLRA does not speak to fair representation issues. Karahalios v. Federal Employees, 489 U.S. 527, 534 (1988).

The duty of fair representation under the Railway Labor Act and the NLRA arises by implication and of constitutional necessity from the legislative grant to unions of the right

to act as an exclusive bargaining agent. Steele v. L. & N. R. Co., 323 U.S. 192, 189-199, 202-203 (1944); O'Neill, 499 U.S. at 65. As explained in Breininger, 493 U.S. at 86-87:

> We need not decide the appropriate scope of §§ 8(b)(1)(a) and 8(b)(2) because we reject the proposition that the duty of fair representation should be defined in terms of what is an unfair labor practice.
>
> . . .
>
> The duty of fair representation is not intended to mirror the contours of Sec. 8(b); rather, it arises independently from the grant under 9(a) . . . of the union's exclusive power to represent all employees in a particular bargaining unit.

Violation of Sec. 9(a) is not listed as an unfair labor practice.

The status of a breach of the duty of fair representation as an unfair labor practice was noted and reserved in Huffman, 345 U.S. at 332 n. 4, the first

fair representation case to reach this Court. The issue was again noted and reserved in 1962 (Borden), 1964 (Huffman), 1967 (Vaca) and 1983 (DelCostello). The issue is ripe for review.

III. THE DECISIONS OF THE BOARD AND THE COURT BELOW ARE WRONG: A RECRUITMENT AND DISPATCH SYSTEM WHICH IS (A) PREDICATED ON THE WORK RECORD AND REPUTATION FOR RELIABILITY OF APPLICANTS AND (B) ACTUATED BY A DESIRE TO REFER ONLY QUALIFIED AND DEPENDABLE WORKERS DOES NOT VIOLATE THE DUTY OF FAIR REPRESENTATION.

The Board (App. p. 56) and the Court below (App. pp. 23-24) held that a per se violation occurs if a union dispatches workers "without objective criteria." This issue was reserved in Breininger, 493 U.S. at 85 n.9. It was decided adversely to the Board in "the unfair labor practice context." Breininger, 493 U.S. 89 n.12, citing Teamsters v. NLRB, 365 U.S. 667 (1961). See also: Labor

Board v. News Syndicate Co., 365 U.S. 695, 699 (1961): "We will not assume . . . discrimination . . . ."

Local 32 dispatched 15 qualified rig welders to fill 13 jobs. Only two members of Local 32 were dispatched. Neither was hired. No rig welders were dispatched from the state of Washington. Five were dispatched from Bakersfield, California, the home of one of the Charging Parties.

According to the ALJ, Local 32 "attempted to refer only qualified and dependable welders." (App. p. 51) At no point did the "General Counsel . . . contend that [Local 32] specifically discriminated against" Charging Parties. Indeed, a contrary stipulation was entered into the record. (App. pp. 69-70) This is not the kind of stuff which supports a finding that Local 32 acted

arbitrarily, discriminatorily or in bad faith. Vaca, 386 U.S. at 190. Compare: Breininger, 493 U.S. at 70 (refusal to dispatch political opponents) and Steele, 323 U.S. at 195 (denial of job opportunities based on race).

If necessary, the issue reserved in Breininger should be decided and, if decided, resolved in favor of the Petitioner.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED this 8th day of August, 1995.

Respectfully submitted,

HUGH HAFER
ANN-MARIE MCKITTRICK

Counsel for Petitioner

Supreme Court, U.S.
FILED

NO. ~~95-255~~

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APPENDIX TO PETITION

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 9, 1995

Decided March 28, 1995

No. 93-1738

PLUMBERS AND PIPE FITTERS LOCAL UNION NO. 32,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Petition for Review and Cross-Application for Enforcement of a Decision and Order of the National Labor Relations Board

---

Bill of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Hugh Hafer argued the cause for petitioner. With him on the briefs was *Ann-Marie McKittrick*. *John E. Rinehart* entered an appearance for petitioner.

Julie B. Broido, Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were *Linda R. Sher*, Acting Associate General Counsel, *Aileen A. Armstrong*, Deputy Associate General Counsel, and *Peter D. Winkler*, Attorney, National Labor Relations Board.

Before BUCKLEY, RANDOLPH and TATEL, *Circuit Judges*.

Opinion for the Court file by *Circuit Judge* TATEL.

TATEL, *Circuit Judge:* The Plumbers and Pipe Fitters Local Union No. 32 petitions for review of an order of the national Labor Relations Board and the Board cross-applies for enforcement.

Adopting the decision of the administrative law judge, the Board found that Local 32 violated its duty of fair representation and committed an unfair labor practice by operating a hiring hall without objective, consistent standards. In accordance with circuit precedent, we reject petitioner's argument that the Board lacks jurisdiction to resolve a duty of fair representation challenge to the operation of a union hiring hall. Finding that the Board applied the correct legal standard and that its decision is supported by substantial evidence, we deny Local 32's petition for review and grant the Board's cross-application for enforcement.

I.

In July 1992, Rockford Corporation d.b.a. Alaska Continental Pipeline Corporation began a pipeline construction

job in the Longview, Washington area. To perform the work, it needed to hire 13 "rig welders." Rig welders own their own welding machines and equipment which they bring to the jobsite mounted on trucks. The employer rents the welding rigs and compensates the welders for their labor.

The collective bargaining agreement between Rockford and the United Association of Plumbers and Pipe Fitters required the United Association to supply half of the rig welders, or seven of the 13 Rockford needed. The United Association chose Local 32 to operate a hiring hall, essentially an employment agency, to find and refer the needed rig welders. Local 32 ultimately referred 15 rig welders in order to fill seven positions because some rig welders failed a preliminary welding test and had to be replaced. The charges and findings of an

unfair labor practice stem from the manner in which Local 32 selected these 15 welders.

Although Local 32 maintained hiring hall lists for other crafts, it referred pipeline welders infrequently and did not have a list for this craft. The union official responsible for staffing the Rockford job, business agent Donald Galloway, was unfamiliar with pipeline work. He asked Jeff Manning, who had attended a pipeline steward school and planned to serve as the union steward for the Rockford job, to compile a list of dependable and qualified rig welders. Galloway also gathered names of rig welders who had worked on a previous Local 32 job and those recommended by other United Association local business managers.

Local 32 did not promulgate any hiring hall rules with regard to the Rockford job. *Plumbers and Pipe Fitters Local Union No. 32*, 312 N.L.R.B. 1137, 1137 (1993) [hereinafter *ALJ Decision*]. Instead, Galloway allegedly relied on Manning's expertise to determine whom to refer. Manning did not rank the welders that he recommended. According to the ALJ, "[w]elders were not dispatched in order of application nor were they ranked in any manner." *ALJ Decision* at 1138. Nor did Galloway or Manning establish that Local 32 had any criteria by which it selected the replacements for referred welders who had failed the preliminary welding test. *Id.*

The absence of articulated standards in Local 32's referral system came to light when two members of other United Association locals, experienced rig

welders William Harper and Michael Flowers, sought work on the Rockford pipeline project. On July 3, they arrived on the Longview jobsite with their truck-mounted welding rigs and inquired about registering for work. Local 32 union steward Manning told them that he was gathering names for Al Sexton, the Local 32 business manager, and that Sexton would call them. Manning failed his welding test that day and ceased working on the project. Two days later, Harper and Flowers attempted to speak to Sexton at the union's office in Seattle, but they were unsuccessful. The union secretary informed them that Sexton was in a meeting and then that he had left the hall. Eventually, the union business manager for plumbing, not pipefitting, agreed to speak to them. He explained that Sexton and Galloway ran

the pipeline work referrals and, when pressed by the men, accepted their travel cards and dues, and allowed them to sign what Harper and Flowers believed was an out-of-work list for pipeline work. Although they in fact had signed a list for construction work, the ALJ credited the manager's testimony that he did not intentionally mislead the men. *Id.*

After receiving no response from Sexton and learning that additional welders were taking the preliminary welding test, Harper and Flowers returned to the Longview jobsite. On July 10, a new union steward, Phil Stroud, asked Harper and Flowers to be patient, promising to let them take the welding test. When they returned later that day, Stroud advised the men to contact Rockford's foreman, which they did. They claim that the foreman told them that he

did not need additional welders. Harper and Flowers remained in the area for several days, waiting for Local 32 to contact them, but it never did. Discouraged, they returned to California. On July 22, Flowers called Galloway who reported that all the welding jobs had been filled.

Harper and Flowers charged Local 32 with committing an unfair labor practice in the operation of its referral system. In identical charges, each alleged that Local 32 "failed to dispatch [him] for arbitrary, capricious and invidious reason" in violation of sections 8(b)(1)(A) & (2) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) & (2)(1988). The Board's General Counsel filed a consolidated complaint against Local 32, casting the alleged unfair labor practice as a breach of the duty of

fair representation. After a hearing, the administrative law judge found that local 32 failed to use objective criteria and standards in the operation of its hiring hall in violation of section 8(b)(1)(A) of the Act, and that Local 32 discriminated against Harper, Flowers and other rig welders seeking employment referrals for reasons not based on objective criteria and standards in violation of section 8(b)(2). *ALJ Decision* at 1139. He recommended that the Board order Local 32 to cease and desist from its unfair labor practice and that it order make-whole relief for Flowers and Harper. *Id.* The Board adopted his recommendations without opinion. *Id.* at 1137. Local 32 now petitions for review and the Board cross-applies for enforcement.

II.

We must first address Local 32's claim that a breach of the duty of fair representation does not amount to an unfair labor practice and, as a result, that the Board lacked jurisdiction in this case. The judicially-created duty of fair representation arises from the union's status as the exclusive bargaining representative of all employees in a bargaining unit. *See* 29 U.S.C. § 159(a)(1988). A union breaches its "statutory duty fairly to represent all of those employees" when its actions are "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967).

With its argument that the Board lacks jurisdiction over a complaint alleging a breach of the duty of fair representation, Local 32 seeks to revive

a debate settled long ago in this circuit. As early as 1967, in *Truck Drivers, Local Union 568 v. NLRB*, this court squarely held that a breach of the duty of fair representation can constitute an unfair labor practice within the jurisdiction of the Board. 379 F.2d 137, 141-42 (D.C. Cir. 1967). We relied on *Vaca v. Sipes*, noting the Supreme Court's "explicit assumption that unfair representation is an unfair labor practice." 379 F.2d at 142. *See also* 2 *The Developing Labor Law* 1413 (Patrick Hardin ed., 3d ed. 1992) (concluding that the Court's discussion of federal preemption in *Vaca v. Sipes* was necessarily premised on the assumption that the breach of a union's duty of fair representation constituted an unfair labor practice under § 8(b) of the Act).

Faced with this clear and binding precedent, Local 32 argues, citing our recent decision in *Lotus Suites, Inc. v. NLRB*, that the authority of *Truck Drivers* is "not significant" because the parties in that case did not litigate the issue of the Board's jurisdiction. 32 F.3d 588, 592 (D.C.. Cir. 1994). In *Lotus Suites*, however, we merely declined to rely on a Supreme Court decision which did not decide the issue before the panel. *Id.* *Truck Drivers* did decide the issue that Local 32 presents here, concluding that the Board has jurisdiction over a complaint alleging a breach of the duty of fair representation. *Truck Drivers*, 379 F.2d at 141-42. we have consistently followed the conclusion reached in *Truck Drivers*, as have other circuits that have decided the issue. *See, e.g., International*

Union of Elec., Elec., Salaried, Mach. and Furniture Workers v. NLRB, 41 F.3d 1532, 1537 (D.C. Cir. 1994); *see also NLRB v. Gen. Truckdrivers*, 778 F.2d 207, 213 (5th Cir. 1985) (partial listing of circuits which decided that breach of the duty of fair representation may be an unfair labor practice). We follow *Truck Drivers* again today and turn to an examination of the Board's decision in this case.

III.

According to well-accepted standards of review, we set aside a decision of the National Labor Relations Board only if it "acted arbitrarily or otherwise erred in applying established law to the facts" at issue, *International Union of Elec., Elec., Salaried, Mach. and Furniture workers*, 41 F.3d at 1536 (citations and internal quotation marks omitted), or if

its findings are not supported by "substantial evidence." 29 U.S.C. § 160(e), (f) (1988). In this case, the Board affirmed the ALJ's determination that Local 32 operated its hiring hall in violation of sections 8(b)(1)(A) and (2) of the Act, which prohibit a union from "restrain[ing] or coerc[ing]" employees in the exercise of their collective bargaining rights, 29 U.S.C. §§ 158(b)(1)(A), 157 (1988), or "caus[ing] or attempt[ing] to cause an employer to discriminate against an employee" in regard to employment so as to encourage union membership. 29 U.S.C. §§ 158(b)(2), (a)(3) (1988).

In *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353 (D.C. Cir. 1988), we reviewed the Board's application of sections 8(b)(1)(A) and (2) of the Act and the duty of fair representation to an

exclusive hiring hall. We explained that a union must maintain a "high standard of fair dealing" when operating a hiring hall because "[t]he union's tremendous authority and the workers' utter dependence create 'a fiduciary duty on the part of the union not to conduct itself in an arbitrary, invidious, or discriminatory manner when representing those who seek to be referred out for employment by it.'" *Id.* at 1358 (quoting *Teamsters Local 519 (Rust Engineering)*, 276 N.L.R.B. 898, 908 (1985) (citations omitted)). Summarizing the applicable law, we held that "a union commits an unfair labor practice if it administers the exclusive hall arbitrarily or without reference to objective criteria and thereby affects the employment status of those it is expected to represent." *Boilermakers*, 852 F.2d at 1358. We thus

affirmed the Board's decision that the union breached its duty of fair representation and violated sections 8(b)(1)(A) and (2) by arbitrarily imposing registration requirements and refusing to inform applicants of the hiring hall rules. *See id.* at 1348, 1361. The ALJ's decision in this case is fully consistent with *Boilermakers*. The ALJ reviewed Local 32's actions to determine whether, in operating its exclusive hiring hall, it had established and employed objective standards in a non-discriminatory manner. *ALJ Decision* at 1138.

Local 32 argues that the standard the ALJ applied is too demanding. Because the Board's General Counsel alleged a violation of the duty of fair representation, Local 32 maintains that the ALJ should have applied the "highly

deferential" interpretation of the "arbitrary" component of that duty which the Supreme Court recently announced in *Air Line Pilots Ass'n, International v. O'Neill*, 499 U.S. 65, 78 (1991). Using the language of *O'Neill*, Local 32 contends that is manner of operating the hiring hall was not "wholly irrational or arbitrary." *Id.* (internal quotation marks and citations omitted).

As Local 32 correctly points out, the *O'Neill* opinion begins with the holding that the *Vaca v. Sipes* tripartite standard of the duty of fair representation "applies to all union activity, including contract negotiations." *Id.* at 67. Immediately following is the "further" holding that "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's

actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Id.* (internal quotation marks and citation omitted). Later in the opinion, the Court specifically states that the duty of fair representation applies when "a union is acting in its representative role, such as when the union operates a hiring hall." *Id.* at 77 (citing *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 66, 87-89 (1989)). These three statements are undeniably broad and, if read in isolation, support Local 32's contention that is actions in operating a hiring hall should be evaluated under the "highly deferential" standard of review. However, closer examination of the context in which the Court arrived at he "wholly irrational" refinement of the "arbitrary" component

of the duty convinces us that the Court did not intend to weaken the standard of review applied to a union's operation of a hiring hall.

At issue in *O'Neill* was a duty of fair representation challenge to the substantive provisions of a strike settlement. Grounding its decision in national labor policy , the Supreme Court found that, although the duty of fair representation applied to contract negotiations, "Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union." *Id.* at 78. The Court's focus on protecting the content of negotiated agreements from judicial second-guessing is apparent from its repeated references to "the substance of negotiated agreements," and "the final

product of the bargaining process." *Id.* at 77-78. Attentive to the special role of the union as negotiator, the Court required that "[a]ny substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Id.* at 78. "For that reason," the Court set forth the "wholly irrational" language, stating that "the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.'" *Id.* (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)(a case similarly addressing the scope of authority of union negotiators)).

This case does not involve a negotiated agreement. At issue here is the operation of a hiring hall, where the union has assumed the role of employer, as well as representative, and where the risk of judicial second-guessing of a negotiated agreement that was of such concern to the Court in *O'Neill* is simply not present. Although the Court rejected the union's attempt in *O'Neill* to differentiate between contract negotiations and contract administration, noting that no "bright-line" can be drawn between the two, *id.*, a union's operation of a hiring hall is easily distinguishable from other activities where the union does not assume the role of employer, *Cf. id.* (indicating that some union activities, like the operation of a hiring hall, "fall into neither category"). As the Supreme Court has

recognized, "if a union does wield additional power in a hiring hall be assuming the employer's role, its responsibility to exercise that power fairly *increases* rather than *decreases*." *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. at 89. We, too, have recognized the union's increased responsibility when it operates a hiring hall. In *Boilermakers*, we held that this dual role called for a "high standard of fair dealing." *Boilermakers*, 852 F.2d at 1358. More recently, we applied the "presumption of illegality" under section 8(b)(2) that "arises whenever an employee loses his job or hiring opportunity as a result of a union's conduct" in the operation of a hiring hall. *Radio-Electronics Officers Union v. NLRB*, 16 F.3d 1280, 1284 (D.C.. Cir.), *cert. denied*, 115 S. Ct. 184

(1994). When a union operates a hiring hall and assumes the dual role of employer and representative, its obligation to deal fairly extends to all users of the hiring hall, not simply to its members or those that it represents.

We remain confident that unions that operate hiring halls without objective criteria violate their duty of fair representation. This was the standard that we approved in *Boilermakers* and that the ALJ properly applied in this case. Absent clear instructions from the Supreme Court, we decline to weaken this principle.

We next consider whether substantial evidence exists to support the ALJ's findings and the Board's conclusion that Local 32 operated its hiring hall in violation of sections 8(b)(1)(A) and (2). We are satisfied that it does. The ALJ's

conclusion that the applicant pool was closed to anyone unknown to Local 32 officials is confirmed by Galloway's own testimony. He described three sources for the welder applicant list: welders whose reputations were known to Manning, welders who had worked on a previous union job and welders recommended by other local business managers. The barriers to unknown applicants are further illustrated by the run-around that Harper and Flowers encountered. The two men arrived on the jobsite, interested and available for work. Informed that Sexton was in charge of referrals, the men sought him out at the union office. Unable to meet with him, they left their travel cards, paid dues and requested that Sexton contact them. Despite two weeks of waiting for a call from the union and repeated trips to the

jobsite, the men were unable to even register for work. Local 32's defense of its operation as a "word-of-mouth" referral system misses the point. True, Harper and Flowers somehow heard about the welding jobs, but Local 32 then arbitrarily excluded them from applying for work. The union's actions plainly violated its fiduciary duty to treat applicants "even-handedly," to inform all potential applicants of relevant hiring hall rules, and to allow qualified individuals to register for work. *See Boilermakers*, 852 F.2d at 1357, 1358.

The ALJ concluded that Local 32's operation of the hiring hall constituted an unfair labor practice in a second important respect: it referred welders to the employer without objective standards. While the parties stipulated that Local 32 sought to refer "competent

and reliable rig welders," the record is devoid of any indication of Local 32's methods for accomplishing this goal. Galloway asserted that he relied on Manning's expertise; yet Manning testified that he did not rank the names on the list that he submitted, nor did he know how Galloway made his selections. *ALJ Decision* at 1138-39. Galloway and Manning offered no explanation of the criteria they used to select the first group of rig welders they dispatched, nor of the selection criteria for the welders they chose to replace those who failed the welding test. This inability to explain their criteria, in addition to the gathering of names through closed channels and the arbitrary exclusion of Harper and Flowers, supports the ALJ's finding that "at best a subjective test was used" that "discriminated[d] in favor

of associates of Galloway and Manning." *ALJ Decision* at 1139. Local 32's claim on appeal that the ALJ rejected its referral system merely because it lacked written rules or a "paper trail" is flatly contradicted by substantial evidence that it had no objective criteria at all.

Equally without merit is Local 32's argument that we must set aside the Board's decision because the record contains no evidence that it favored its own members. This argument ignores our decision in *Boilermakers*, where we held that evidence of a "specific intent to discriminate on the basis of union membership or activity" is not required to find an unfair labor practice. *Boilermakers*, 852 F.2d at 1358. When considering violations of section 8(b)(2), we have recognized that "conduct

by the union which causes firing or prevents hiring demonstrates the union's power so dramatically that its illegality is presumed." *Radio-Electronics Officers Union*, 16 F.3d at 1284 (citation and internal punctuation omitted). The union's argument also fails to recognize that the General Counsel's complaint did not allege specific discrimination in favor of the union's own members or against Harper and Flowers, but "rather that the arbitrary nature of the selection process breached the Union's duty of fair representation to all qualified applicants." *ALJ Decision* at 1138. The ALJ concluded that Local 32's conduct violated section 8(b)(2) because its subjective operation of the hiring hall ultimately resulted in the employer's refusal to hire Harper,

Flowers or other unknown rig welders seeking referral. *Id.*

Finally, we are not persuaded by Local 32's argument that the ALJ's decision is inconsistent with prior Board decisions. Contrary to Local 32's contention, the Board did not condone the use of subjective criteria in *Morrison-Knudsen Co.*, 291 N.L.R.B. 250 (1988). There, the union referred workers according to priorities upon which it and the company had agreed, including employer requests for particular workers, workers who had previously worked for the employer, and minorities and women. *See id.* at 256-58. Apart from these agreed upon priorities, the union operated its hiring hall on a general "first-in, first-out" basis. *Id.* These criteria, although unwritten, were consistently applied and had been approved by the

Board in earlier cases. *See id.* at 259. In *International Alliance of Theatrical and Stage Employees Local 592*, the other case that Local 32 cites, the Board found that the union referred workers according to "seniority, ability and availability," which are "objective standards." 266 N.L.R.B. 703, 710 (1983). The Board's decision in the instant case is not a departure from its consistent position that union's must use objective criteria, whether written or unwritten, in the operation of exclusive hiring halls.

We deny Local 32's petition for review and grant the Board's application for enforcement of its order.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 93-1738 September Term, 1994
Filed June 7, 1995

Plumbers and Pipe Fitters
Local Union No. 32,
United Association of,

Petitioner,

v.

National Labor Relations Board

BEFORE: Buckley, Randolph and Tatel,
Circuit Judges

O R D E R

Upon consideration of petitioner's petition for rehearing filed May 8, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

Plumbers and Pipe Fitters Local Union No. 32, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Rockford Corporation d/b/a Alaska Continental Pipeline, Inc.) *and* William Harper *and* Michael Flowers. Cases 19-CB-7206 and 19-CP-7208

October 29, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 23, 1993, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and

conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Plumbers and Pipe Fitters Local Union No. 32, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Seattle, Washington, its officers, agents, and representatives, shall take the action set forth in the Order.

Dated, Washington, D.C. October 29, 1993.

James M. Stephens, Chairman

Dennis M. Devaney, Member

1. The correct citation to *Morrison-Knudsen Co.* is 291 NLRB 250 (1988), rather than the citation listed by the judge.

John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

Cases 19--CB--7206 and 19--CB--7208

PLUMBERS AND PIPE FITTERS LOCAL UNION NO. 32, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO (Rockford Corporation d/b/a Alaska Continental Pipeline, Inc.)

and

WILLIAM HARPER, an individual

and

MICHAEL FLOWERS, an individual

James Sand, Atty., Seattle, WA,
for the General Counsel.
Hugh Hafer, Esq. (Hafer, Price, Rinehart & Robblee), Seattle, WA
for the Respondent.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this consolidated case in

trial at Seattle, Washington, on February 4, 1993. On August 10, 1992, William Harper filed the charge in Case 19--CB--7206 alleging that Plumbers and Pipe Fitters Local 32 (Respondent or the Union) committed certain violations of Section 8(b)(1)(A) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). Michael Flowers filed a charge in Case 19--CB--7208 on August 12, 1992. On October 7, 1992, the Regional Director for Region 19 of the National Labor Relations Board issued a Consolidated Complaint and Notice of Hearing against Respondent, alleging that the Union violated Section 8(b)(1)(A) of the Act by refusing to let Harper and Flowers register at its hiring hall and by refusing to refer Harper and Flowers to a mainline pipeline construction job.

Respondent filed a timely answer and amended answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following:

Findings of Fact and Conclusions

I. Jurisdiction

Rockford Corporation d/b/a Alaska Continental Pipeline, Inc., (the Employer) is a Delaware corporation with an office and place of business in Longview, Washington, where it is engaged in pipeline construction. During the twelve months prior to the issuance of

the complaint, the Employer sold and shipped goods or provided services from its facilities in Washington to customers outside the State, or sold goods or provided services to customers inside the State, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of $50,00 (sic).

Accordingly, I find and the Union admits that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits and I find that at all times material herein Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

In July 1992, the Employer was engaged in a pipeline construction job in

the vicinity of Longview, Washington. The pipeline work was performed under the terms of the National Pipeline Agreement between the Pipeline Contractors Association and United Association of Plumbers and Pipe Fitters. Pursuant to the terms of the agreement the Plumbers and Pipe Fitters were to be the exclusive source for one half of the rig welders utilized on the Employer's Longview jobsite. Respondent was designated as the local union responsible for the dispatch of welders to the project and for administration of the collective bargaining agreement. Respondent dispatched seven of the thirteen rig welders on the project. This case concerns the manner in which Respondent dispatched rig welders to the jobsite. No other job classification is at issue.

Respondent maintained hiring hall lists for the construction and maritime industries. However, Respondent did not maintain a list for pipeline welders. The last time Respondent had any pipeline work in its jurisdiction was in 1990. Respondent operated its dispatch procedures for the jobsite without published or promulgated hiring hall rules. It did not maintain any written list of applicants nor dispatch in order of application.

Jeff Manning, a member of Respondent, was chosen by the Union to be the first employee on the job and to be Union steward. The business agent responsible for servicing this job, Donald Galloway, was not familiar with pipeline work. Galloway asked Manning for a list of employees known by Manning to be dependable and qualified rig

welders. In addition to the list given him by Manning, Galloway had a list of rig welders who had worked the 1990 job and had received telephone calls from business managers from other locals recommending certain of their members. From this pool of applicants Galloway dispatched employees as needed by the Employer. Welders were not dispatched in order of application nor were they ranked in any manner.

When questioned as to how employees were selected from this pool of applicants Galloway said he relied on Manning. Manning testified that he submitted a list to Galloway and did not know how Galloway chose from the list. Several employees not on Manning's list were referred to Galloway by the business managers of their local unions. One employee was referred by his uncle, a

welder chosen by Galloway. Additional jobs opened as employees failed welding tests or left for other reasons. Neither Galloway nor Manning could explain how employees were selected for these job openings. The employees on Manning's list were known to him from prior jobs or from a steward's training school he attended. Some of the employees were only known to Manning by reputation.

Harper and Flowers were members of a Plumbers local union in Bakersfield, California and were experienced rig welders. On July 3, Harper and Flowers visited the jobsite looking for work. They were directed to Manning who had been dispatched to the job as union steward. Harper and Flowers asked about working on the job and were directed to Al Sexton, the Union's business manager. Manning said he was getting names of

welders to give to Sexton and told the welders that Sexton would call them. Manning failed his welding test and did not work on the jobsite after July 3

On July 5, the two rig welders went to the Union's offices in Seattle, Washington to sign the out of work list for referral to the pipeline job. Flowers and Harper waited to see Sexton but Sexton left the offices on business without seeing the two welders. The receptionist asked Tim Elwell, business agent, to talk to the two employees. Elwell told them that he did not handle pipeline work but would try to help them. According to Elwell, the employees insisted on signing an out of work list and so he gave them the list for welders in the construction industry. This was the only list for welders that Elwell had. Harper and Flowers testified that

they signed the list after being told it was for pipeline welders. I credit Elwell's testimony that he did not tell the employees that the list was for pipeline work. There was no such list. Rather, I find that Elwell simply gave the employees a welders list to sign and that the employees assumed it was for pipeline work because they recognized the name of a pipeline welder on the list.

On July 6, Harper and Flowers, returned to the jobsite where they observed workers on the jobsite. Believing that these welders had signed the out of work list after them. Harper and Flowers called Manning. Manning referred the employees to Sexton.

On July 10, Flowers and Harper went to the jobsite and found Phil Stroud, the new union steward. Stroud told the employees to be patient and he would get

them a chance to take the welding test. Flowers and Harper returned later that day, after two welders had failed their tests. Flowers asked if he and Harper could get on the job and Stroud referred them to the Employer's superintendent.

On July 11, Flowers called Manning and said he was sorry that they had gotten off on the wrong foot. Manning said there was no problem. He told Flowers that Sexton was handling the pipeline job.

On July 22, Galloway spoke with Flowers and told him that the jobs had been filled but "maybe if some guys bust the welding test we can get you on the job." Harper and Flowers had no further contact with the Union and were not referred to the job.

No members of Respondent worked as welders on this job. The only two

qualified members of Respondent were dispatched but did not pass their welding tests. Respondent attempted to dispatch rig welders from the State of Washington but got no qualified applicants. Thus, all the welders on the job, dispatched by Respondent, were from out of State and were members of other local unions. General Counsel does not contend that Respondent specifically discriminated against Flowers and Harper but rather that the arbitrary nature of the selection process breached the Union's duty of fair representation to all qualified applicants.

Analysis and Conclusions

Section 8(b)(1)(A) of the Act provides that it shall be an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in

Section 7 of the Act." The proviso to Section 8(b)(1)(A) states that the Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." Section 8(b)(2) makes it an unfair labor practice for a union:

> to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than failure to tender the periodic dues and the initiation fees uniformly required as a

condition of acquiring or retaining membership.

It is well settled that a labor organization that undertakes to operate a hiring hall pursuant to an arrangement with an employer as the exclusive source of employees[1] is obligated to refer individuals without regard to their union membership or lack thereof. The Board requires the establishment and nondiscriminatory use of objective standards in the operation of exclusive hiring halls. Painters, Local 277 v. NLRB, 717 F.2d 805, (3d Cir. 1983), enforcing 262 NLRB 1336 (1982); Painters Local 1178, 265 NLRB 1341 (1982). The

1. Under the relevant agreement the Employer reserved the right to request employees by name pursuant to a formula set forth in the contract. Under this agreement the Employer chose 6 employees, leaving the Union with the task of referring 7 employees. Under Board law, the Union operated an exclusive hiring hall not withstanding that the Employer had the right to choose half the employees. Carpenters Local 608 (Various Employers), 279 NLRB 747, 754 (1986).

absence of written standards is not itself violative of the Act, but is one factor to be considered in determining whether a hiring hall has been operated objectively. Laborers, Local 394 (Building Contractors), 247 NLRB 97, fn. 2 (1980); Federated Department Stores, 287 NLRB 951 (1987).

Galloway testified that he was not familiar with pipeline work and that he referred employees based on the recommendations of Manning and some business managers from other locals. He also referred one employee on the recommendation of that employee's uncle. Galloway had more recommendations than jobs to fill. However, he could not explain how the employees were selected from the pool of recommended employees. Manning admitted that he gave recommendations to Galloway but denied

any knowledge as to how the employees were chosen. Manning did not rank the employees. There were additional openings after the job started because some employees failed the welding test. However, neither Galloway or Manning could explain how employees were chosen for these job openings. Employees were not referred in chronological order.

While the record shows that Manning and Galloway attempted to refer only qualified and dependable welders, at best a subjective test was used. It would appear that such a subjective test discriminates in favor of associates of Galloway and Manning. Qualified welders such as Harper and Flowers could not be considered because they were unknown to Galloway and Manning. Assuming Manning and Galloway did not discriminate nor intend to discriminate, it is still

impossible to find any objective criteria or standards for choosing among the qualified applicants. Neither Manning nor Galloway could express any objective criteria or standard. Accordingly, I find the operation of the hiring hall was violative of Section 8(a)(1)(A) of the Act.

In Morrison-Knudsen Co., 292 NLRB 250 (1988), cited by Respondent, the Board found no violation where the agreement required the union to refer the most qualified individual available at the time of the opening. The Board found that the union business agent sought in good faith to determine the qualifications of applicants at the hall and that certain employees had skills and experience that qualified them for the jobs to which they were referred. The Board found that the referral operation

was not left to the unbridled discretion of the business agent. Rather, the referrals were objectively considered in that a record was made of each individual's qualifications as stated by the individual in conjunction with the business agent's assessment based on questions he had asked the individual, and the referral records, which indicated whether an individual had worked on the waterway in the past. Id. at 250-251, fn. 6.

I find the instant case to be clearly distinguishable from Morrison-Knudsen. Here, this (sic) no evidence of what criteria, if any, Galloway used in referring employees. Galloway chose from a pool of rig welders which consisted of employees recommended by Manning and by business managers from other locals. Employees unknown to Manning, such as

Harper and Flowers, would be excluded from this pool no matter how qualified. As to employees included in the pool, even Galloway could not provide the criteria or standards used in selecting rig welders for referral.

Respondent argues that even if it is established that the hiring hall was operated in violation of the Act, all welding positions were filled at the time Harper and Flowers applied for work. Thus, Respondent argues that neither employee is entitled to a make whole remedy. The welding jobs were not filled as of the time that Harper and Flowers applied for work. Presumably Respondent means that employees were selected for these jobs prior to July 3. Assuming that the welding jobs were filled at the time of Harper's and Flowers' initial visit to the jobsite, other openings

occurred thereafter as employees failed their welding tests or left for other reasons. In fact, Respondent referred 15 employees for the 7 positions it needed to fill. Respondent's operation of the hiring hall makes it impossible to determine whether Harper and Flowers would have been referred. The Board has held that "it is unnecessary to show that jobs were available at the time of the request for referral." Pipeline Local Union No. 38 (Hancock-Northwest, J.V.), 247 NLRB 1250 (1980). Teamsters Local 519 (Rust Engineering), 275 NLRB 433 (1985). I, therefore, find that Harper and Flowers were refused referral in violation of Section 8(b)(2) of the Act and leave to the compliance stage any issues concerning backpay.[2]

2. Although the complaint only alleges a violation of Section 8(b)(1)(A), the issue of a refusal to refer Harper and Flowers was alleged in the complaint. Further, the refusal to refer

Conclusions of Law

1. Rockford Corporation d/b/a Alaska Continental Pipeline, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent, Plumbers and Pipe Fitters Local Union No. 32, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(b)(1)(A) of the Act in operating its exclusive hiring hall by failing to use objective criteria and standards in referring applicants for employment as rig welders to the Employer at the Longview, Washington jobsite.

4. Respondent violated Section 8(b)(2) by discriminating against William

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the welders was fairly and fully litigated. I, therefore, find that Respondent also violated Section 8(b)(2).

Harper, Michael Flowers and other rig welders seeking referral for employment for reasons not based on objective criteria and standards, thereby causing the Employer to refuse to hire the employees.

5. Respondent's acts and conduct above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in unfair labor practices, I recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Based on the lack of objective criteria and the lack of a ranking of employees it is impossible to determine if and when Flowers and Harper would have

been referred. Accordingly, I will order a make whole remedy and leave to the compliance stage of these proceedings the remedial issues raised by Respondent's lack of records. Respondent should be ordered to make whole Harper and Flowers for any losses they may have suffered by reason of the discrimination against them. The Employer's Longview job is completed. Therefore, reinstatement is not applicable. Backpay shall be computed on a quarterly basis, as prescribed in F.W. Woolworth Company, 90 NLRB 289 (1950), with interest computed in accordance with New Horizons for the Retarded, 283 NLRB 1173 (1987).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section

10(c) of the Act, I hereby issue the following recommended (sic):[3]

ORDER

Respondent Plumbers and Pipe Fitters Local Union No. 32, its officers agents and representatives, shall:

1. Cease and desist from:

(a) Discriminating against Michael Flowers, William Harper and other job applicants seeking referral for employment through its exclusive hiring hall at the Alaska Continental Pipeline jobsite at Longview, Washington, because of arbitrary reasons not based on objective, consistent criteria and standards, thereby causing Alaska Continental Pipeline to discriminate

3. All motions inconsistent with this recommended order are hereby denied. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

against employees in violation of Section 8(a)(3) of the Act.

(b) Failing to use objective, consistent criteria and standards in referring applicants for employment through its exclusive referral system to the Alaska Continental Pipeline jobsite, or to any other employer with whom it maintains an exclusive job-referral system for pipeline welders.

(c) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Michael Flowers and William Harper for any loss they may have suffered by reason of the discriminatory refusal to refer them to

the Alaska Continental Pipeline job, in the manner set forth in the "Remedy" section of this decision.

(b) Preserve and upon request, make available to the Board or its agents for examination and copying, all hiring hall records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(c) Post at its hiring hall, meeting rooms and offices in Seattle, Washington, copies of the attached notice marked Appendix" (sic).[4] Copies of the notice, on forms provided by the Regional Director for Region 19, in English and such other languages as the Regional

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4. If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Director determines are necessary to fully communicate with employees, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material.

(d) Notify the Regional Director of Region 19 in writing within 20 days after the date of this Order, as to what steps have been taken by Respondent to comply with the terms of the Order.

Dated: March 23, 1993

Jay R. Pollack
Administrative Law Judge

STIPULATIONS (R. 259-262)

1. With respect to Paragraph 4 of the Complaint and Amended Answer, the parties agree that Jeff Manning, a member of Local 32, was dispatched to the Rockford job at Longview as steward, but that on July 3, he failed the required welding test and was not employed by Rockford after July 4. Separate and apart from that stipulation, it is stipulated that Manning was a significant source of information concerning pipeline welders for Local 32 and that Local 32 relied upon information concerning welders provided by Manning in making its dispatches to the Rockford project.

2. The parties stipulate to the authenticity of General Counsel's proposed Exhibits 2 through 11 and agree to their admission into evidence, provided that neither party waives any

argument as to materiality or relevance of any such document or piece of information therein as such arguments may affect the weight to be given such evidence. It is further stipulated that General Counsel's Exhibit 9 consists of an annotated and modified summary of employment of welders and journeymen (the latter being not here relevant) on its Longview project, together with information as to whether such individuals were dispatched by the union or name-called by the company under the terms of the relevant agreement, and the dates upon which the records of the company which conducted the weld tests reflect that such individuals were tested. This composite summary is agreed to for purposes of the unfair labor practice hearing only, and shall not be binding upon either party in the event a

subsequent compliance, i.e., backpay, proceeding becomes necessary herein. It is also agreed that Exhibit 11 consists of pages from the current United Association international constitution.

3. The parties further stipulate as follows: There was nothing written down or any memorandum regarding how Local 32 would make dispatches to this project. Local 32 did not want to lose jurisdiction over this work, which jurisdiction it was within the power of the International Union to withdraw, and thus had an interest in dispatching competent and reliable rig welders to Rockford. Local 32 initially considered its own membership to fill the requirements of the job; however, it identified only two potential rig welders to refer from among that group (Manning and Wheatley). Local 32 contacted other

locals within the State of Washington. Local 32 also contacted other locals who were doing this sort of work.

Local 32 relied upon Jeff Manning as its "pipeline person." Manning was to be the steward on the job, however, as above stipulated, he failed the welding test. Manning had worked with rig welders before. In addition, he had been sent to pipeline steward school by Local 32 in the spring of 1992 and had there learned of other rig welders who had good reputations. Manning accumulated the names of individuals who were good at this work, reliable and did not have drinking or drug-related problems. Local 32 thus relied upon general reputation of the rig welders as well as Manning's personal experience in working with some of them.

Local 32 also used as a source of manpower individuals recommended by business managers of other locals. Finally, rig welders would hear about such work in advance, and would contact Local 32 and indicate their interest in performing it. Manning and pipeline business agent, Don Galloway, were responsible for selecting and contacting the individuals who were ultimately dispatched by Local 32. There was no formal list, as such, of individuals who would be dispatched to this project. Some of those dispatched had not contacted Local 32 to request dispatch for this project before being called by Local 32.

The rig welders were not called for dispatches in any particular order. There was no first in/first out or similar kind of system used for

referrals. The rig welders who were dispatched were not required to put their travel cards into the Local 32 hall before being dispatched. Travel cards, a subject of internal union rules and procedures, were not used as eligibility criteria for referrals.

There were no Local 32 members dispatched to Rockford for this project with the exception of the initial sequential dispatches of Manning and Wheatley. Each was sequentially dispatched to be steward, but both failed the welding test. All other individuals who were dispatched came from locals outside the State of Washington.

4. It is anticipated that during the course of the testimony, there will be evidence offered by General Counsel of a conversation on or about July 3, 1992 between the charging parties and Jeff

Manning, and about the fact that Manning was later at the Local 32 hall in the company of Mr. Sexton at the time that the charging parties went to the hall on July 6 to attempt to sign up for dispatch to the Rockford job as rig welders. While General Counsel believes that this testimony may tend to buttress its arguments with respect to the level of subjectivity which Mr. Manning may have indulged in when making his recommendations to Local 32, General Counsel acknowledges that this evidence is not offered as the basis for a "free standing" or specific allegation of discrimination against Flowers, or by association, Harper, as a result of Flowers' earlier protected concerted activity or lack thereof such that there would be any basis for finding that either was discriminated against for such

activity in the face of an otherwise lawful hiring procedure. That allegation is neither intended to be raised by the Complaint, pressed by General Counsel, nor intended by the parties to be litigated here.

Agreed and stipulated at Seattle, Washington this 4th day of February, 1993.

For General Counsel:

_____

James C. Sand

For Respondent, Local 32:

_____

Hugh Hafer

NATIONAL PIPE LINE AGREEMENT
(R. 267, 272, 275)

AGREEMENT made by and between the PIPE LINE CONTRACTORS ASSOCIATION, its contractor members and such other mainline pipe line contractors who execute an acceptance of the terms and provisions of this Agreement, hereinafter referred to as the "Employer," and THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, hereinafter referred to as the "Union."

* * *

IV.

EMPLOYMENT, LAY-OFF AND DISCHARGE OF PERSONNEL

(A) Employer shall have full responsibility for management, and shall be the sole judge as to the number of

employees required, subject to the conditions hereinafter stated.

. . .

(G) The conditions to be followed in the initial hiring or replacement of employees are:

1. Employer retains the right to reject any job applicant and may exercise the right before the Union dispatches any employees required by Employer. Upon request, Employer will confirm by letter or telegram any verbal rejections made.

2. The selection of applicants for referral by Union or hired directly by Employer shall not be based on, or in any way affected by, Union membership, bylaws, rules, regulations, constitutional provisions or any other aspect of or obligation of Union membership, policy or requirements.

3. There shall be no limitation on Employer's right to select employees with particular classifications or skills from among the employees hired by Employer direct. Nor shall there be any limitation on Employer's right to assign employees to particular classifications because of the employee's membership or non-membership in a particular local union.

TESTIMONY OF DONALD R. GALLOWAY,
UNION BUSINESS AGENT
(R. 196, 230-232)

DONALD R. GALLOWAY

was called as a witness, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. BY MR. HAFER: Please give us your name and address for record?

A. My home address?

Q. Home or business address. It doesn't matter.

A. My name is Donald R. Galloway. My business address is 2311 Second Avenue, Seattle, Washington.

Q. You work for Local 32, correct?

A. Yes.

Q. How many years have you worked for Local 32?

A. Oh. About 19-and-a-half years.

Q. Are you a business agent?

A. Yes.

Q. During 1992, were you responsible for, among other things, dispatching workers to the Rockford pipeline job?

A. Yes.

. . .

JUDGE POLLACK: But how did you determine from that list who the seven people would be?

THE WITNESS: Well, some of the fellows had been in there before, and they were personally known to me, and the quality of work that they did. Some of them might appear on this list here. (Indicating.) Some of the other ones that were supplied by Mr. Manning are not on this list, but they were on Jeff's list.

Jeff is our principal pipeline man within our local jurisdiction. Jeff has gone to the steward school in Tulsa,

Oklahoma, twice. Jeff's primary livelihood when he came into this local was from pipeline. Jeff works pipeline where he can and when he can, when the work is available.

He's got the expertise that I don't have, not being a pipeliner. We rely upon Jeff considerably for the information that we need to get these jobs done.

JUDGE POLLACK: So did he choose people he thought were the seven best, is that how you --

THE WITNESS: That's basically right for the names, outside of a few of the fellows that were referred to us by their various business managers. Mike McDuffy, that came right from his business manager. Williams, he was from down in Oakland, California. Mr. Roger Wilgram, he came from Dick Pipky, the

financial secretary of Milwaukee, Wisconsin, Local 601. They were highly recommended people, you know, they can do this type of work.

JUDGE POLLACK: All right. After you initially sent out people, because people failed the test for other reasons, and you ended up sending out more people, how did you determine who those people would be?

THE WITNESS: Billy Boyt was one of the welders that came in later. Billy would have gone on a job probably earlier on, but for the fact that his welding rig had gone out on him, and he couldn't make those early dates to come in here. He had to get that thing repaired. Even Phil Stroud, even though he was actually dispatched -- you know, the dispatch was made out on the seventh of July, he started out, and his truck went out on

him. He had to put that in the garage for about two days before he could finally get in here.

When you talk to a lot of these people, and they're ready to go, and all of a sudden somebody's wife slips and falls and breaks her leg, and he calls you right back and says, "I can't make it." So you move on to pick up another one. The guy anticipated coming in, you anticipated having him here, and then something unforeseen happens, you stay in contact with him, and when the first opening comes, you pick him up again and see if you can get him into the spot.

JUDGE POLLACK: All right. Mr. Hafer, do you have any other questions?

§ 157. Right of employees as to organizations, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158(a) Unfair Labor practices by employer

It shall be an unfair labor practice for an employer-

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, . . . *Provided*

further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership;

§ 158(b). Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents-

(1) to restrain or coerce (A) employees in the exercise of the rights

guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

§ 158(f).

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership

in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: . . . .

§ 159.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the

employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

5 USC § 7114

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

5 USC § 7116

§ 7116 Unfair labor practices

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization-

(1) to interfere with, restrain, or coerce any employee in the exercise by

the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

Supreme Court, U.S.
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No. 95-255

In the Supreme Court of the United States

OCTOBER TERM, 1995

PLUMBERS AND PIPE FITTERS LOCAL UNION NO. 32,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that the union violated the National Labor Relations Act, and breached its duty of fair representation, by operating an exclusive hiring hall in an arbitrary and discriminatory manner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 50 F.3d 29. The decision and order of the National Labor Relations Board (Pet. App. 33-35), and the decision of the administrative law judge (Pet. App. 36-62), are reported at 312 N.L.R.B. 1137.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1995. A petition for rehearing was denied

on June 7, 1995. Pet. App. 32. The petition for a writ of certiorari was filed on August 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1992, Rockford Corporation (Rockford) began a pipeline construction project in Longview, Washington. A labor contract between Rockford and the United Association of Plumbers and Pipe Fitters (United Association) required the United Association to supply Rockford with seven of 13 "rig welders," whom Rockford needed to carry out the project. The United Association, in turn, selected petitioner, Local Union No. 32 of the United Association (Union), to operate a hiring hall in order to find qualified rig welders and to refer them to Rockford. Pet. App. 3-4.

Although the Union maintained hiring hall lists for jobs in the construction and maritime industries, it did not maintain a referral list for pipeline welders. Moreover, business agent Donald Galloway, the Union official responsible for staffing the Rockford job, was unfamiliar with pipeline work, and the Union had not performed any pipeline work within its jurisdiction since 1990. Pet. App. 5, 41. Accordingly, Galloway asked Jeff Manning, who had been selected by the Union to serve as steward on the Rockford job, to compile a list of individuals whom Manning knew to be dependable and qualified rig welders. Galloway also gathered the names of rig welders who had worked on a project staffed by the Union in 1990, and the names of individuals recommended by the business managers of other United Association locals. *Id.* at 5, 41-42. Galloway dispatched rig welders to the Rockford jobsite from this pool of applicants, as they

were needed. *Id.* at 5, 42. However, the Union did not establish any rules governing the operation of its hiring hall: the Union did not maintain any written list of applicants for rig welding work, did not dispatch individuals to the Rockford jobsite in order of application, and did not rank the applicants in any manner. *Id.* at 6, 41, 42-43.

On July 3, 1992, William Harper and Michael Flowers, experienced rig welders who were members of a United Association local in Bakersfield, California, sought work at the Rockford job site. Pet. App. 7, 43. Union steward Manning told Harper and Flowers that he was gathering names for Al Sexton, the Union's business manager, and that Sexton would call them. *Id.* at 7, 43-44. Manning, however, failed his welding test the same day and did no further work on the Rockford project. Two days later, on July 5, Harper and Flowers attempted, unsuccessfully, to speak with Sexton at the Union's office in Seattle; however, they did meet with Tim Elwell, a Union business agent responsible for plumbing, not pipefitting, work. *Id.* at 7, 44. Elwell explained that Sexton and Galloway handled pipeline work referrals and, when pressed by Harper and Flowers, accepted their travel cards, and allowed them to sign what they believed was an out-of-work list for pipeline welders. *Id.* at 7, 44-45.

Five days later, on July 10, 1992, after receiving no response from Sexton and learning that additional welders were taking the welding test, Harper and Flowers went again to the Rockford jobsite. Phil Stroud, the new Union steward, asked them to be patient, promising to allow them to take the welding test. Pet. App. 8. Harper and Flowers returned later that day, after two individuals failed the welding test.

Flowers again asked Stroud whether he and Harper could "get on the job." Stroud responded by referring them to Rockford's foreman, who (according to Harper and Flowers) told them that he did not need additional welders. *Id.* at 8-9, 46. Harper and Flowers remained in the Longview area for several days, waiting, to no avail, for the Union to contact them. Discouraged by their inability to obtain a referral to the Rockford job from the Union, they returned to California. On July 22, Flowers called Galloway, who reported that all the welding jobs on the Rockford project had been filled. *Id.* at 9, 46.

2. Harper and Flowers filed unfair labor practice charges against the Union. On October 7, 1992, the General Counsel of the National Labor Relations Board (Board) issued a consolidated complaint, alleging that the Union breached its duty of fair representation, and violated Section 8(b)(1)(A) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(1)(A), by arbitrarily refusing to dispatch Harper, Flowers, and other qualified applicants from its hiring hall to jobs on the Rockford project. Pet. App. 37, 47.

a. After a hearing, the administrative law judge (ALJ) concluded that the Union violated Section 8(b)(1)(A) in the operation of its exclusive hiring hall, by failing to use objective criteria and standards in referring applicants to the Rockford jobsite for employment as rig welders. Pet. App. 56.[1] The ALJ

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[1] Initially, the ALJ noted that, although under the terms of the labor contract between Rockford and the United Association "[Rockford] chose 6 employees, leaving the Union with the task of referring 7 employees[,] * * * the Union operated an exclusive hiring hall notwithstanding that [Rockford] had the right to choose half the employees." Pet. App. 49 n.1. In the

explained that "Galloway testified that he was not familiar with pipeline work and that he referred employees based on the recommendations of Manning and some business managers from other locals." *Id.* at 50. However, other than making one referral on the basis of a recommendation supplied by the applicant's uncle, the ALJ found that Galloway "could not explain how the employees were selected from the pool of recommended employees." *Ibid.* Similarly, the ALJ observed that "Manning admitted that he gave recommendations to Galloway but denied any knowledge as to how the employees were chosen." *Id.* at 50-51. Further, the ALJ noted that neither Galloway nor Manning could explain how applicants were selected for referral to job openings which were created when some employees failed the welding test. *Id.* at 51. Accordingly, the ALJ concluded that the Union's operation of its exclusive hiring hall violated Section 8(b)(1)(A) because "it is * * * impossible to find any objective criteria or standards for choosing among the qualified applicants." *Id.* at 51-52. Rather, the ALJ explained that, "[w]hile the record shows that Manning and Galloway attempted to refer only qualified and dependable welders, at best a subjective test was used," with the result that "[q]ualified welders such as Harper and Flowers could not be considered because they were unknown to Galloway and Manning." *Id.* at 51.

The ALJ also concluded that the Union violated Section 8(b)(2) of the NLRA, 29 U.S.C. 158(b)(2), by

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court of appeals, the Union did not challenge the Board's determination that it operated an exclusive hiring hall with respect to the Rockford project, and it does not contest the Board's ruling in this Court.

discriminating against Harper, Flowers, and other rig welders seeking job referrals, for reasons not based on objective criteria and standards, thereby causing Rockford to refuse to hire them. Pet. App. 56-57.[2] The ALJ explained that, by making job referrals on the basis of a "subjective test," the Union "discriminate[d] in favor of associates of Galloway and Manning" (*id.* at 51), for "[e]mployees unknown to Manning, such as Harper and Flowers, would be excluded" from the pool of applicants eligible for dispatch to rig welding jobs "no matter how qualified" (*id.* at 53-54).

To remedy its unfair labor practices, the ALJ ordered the Union, among other things, to cease and desist from failing to use "objective, consistent criteria and standards" in referring applicants to the Rockford project or to jobs with "any other employer with whom [the Union] maintains an exclusive job-referral system for pipeline welders," and to make Harper and Flowers whole for any losses they may have suffered by reason of the Union's discriminatory refusal to dispatch them to jobs on the Rockford project. Pet. App. 60-61.

b. The Board affirmed the ALJ's findings and conclusions, and adopted his remedial order. Pet. App. 33-35.

3. The court of appeals enforced the Board's order. Pet. App. 1-31. The court explained that "a union commits an unfair labor practice if it administers

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[2] The ALJ noted that, "[a]lthough the complaint only alleges a violation of Section 8(b)(1)(A), the issue of a refusal to refer Harper and Flowers was alleged in the complaint," and, moreover, "the refusal to refer the welders was fairly and fully litigated." Pet. App. 55 n.2.

the exclusive hall arbitrarily or without reference to objective criteria and thereby affects the employment status of those it is expected to represent." *Id.* at 16 (quoting *Boilermakers Local No. 374* v. *NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988)). Applying that principle, the court held that substantial evidence supported the Board's finding that the Union operated its hiring hall in violation of the NLRA. Pet. App. 24. The court found that "[t]he ALJ's conclusion that the applicant pool was closed to anyone unknown to [Union] officials is confirmed by Galloway's own testimony," and that "[t]he barriers to unknown applicants are further illustrated by the run-around that Harper and Flowers encountered." *Id.* at 24-25. The court agreed with the ALJ that "'at best a subjective test was used' that 'discriminate[d] in favor of associates of Galloway and Manning.'" *Id.* at 27-28. "The union's actions," the court observed, "plainly violated its fiduciary duty to treat applicants 'even-handedly,' to inform all potential applicants of relevant hiring hall rules, and to allow qualified individuals to register for work." *Id.* at 26.

In sustaining the Board's order, the court rejected the Union's contention that, because "a breach of the duty of fair representation does not amount to an unfair labor practice[,] * * * the Board lacked jurisdiction in this case." Pet. App. 11. The court explained that it had long held "that a breach of the duty of fair representation can constitute an unfair labor practice within the jurisdiction of the Board." *Id.* at 12. The court also rejected the Union's contention that, "[b]ecause the Board's General Counsel alleged a violation of the duty of fair representation, * * * the ALJ should have applied the 'highly deferential' interpretation of the 'arbitrary' com-

ponent of that duty" set forth in *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65 (1991). Pet. App. 17-18. The court explained that "[a]t issue in *O'Neill* was a duty of fair representation challenge to the substantive provisions of a strike settlement," and that, "[a]ttentive to the special role of the union as negotiator, the Court required that '[a]ny substantive examination of a union's performance * * * must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.'" *Id.* at 20, 21 (quoting *O'Neill*, 499 U.S. at 78). By contrast, the court explained, "[t]his case does not involve a negotiated agreement"; rather, "[a]t issue here is the operation of a hiring hall, where the union has assumed the role of employer, as well as representative, and where the risk of judicial second-guessing of a negotiated agreement * * * is simply not present." Pet. App. 22.

ARGUMENT

1. In *Local 357, Int'l Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 667, 674-677 (1961), this Court held that the use of a union hiring hall as the exclusive source of job referrals does not constitute discrimination within the meaning of the NLRA, provided that the hiring hall is open to both members and nonmembers and that there is no showing of discrimination against nonmembers. The operator of an exclusive hiring hall, however, owes a duty of fair representation to the users of the hall, and that duty includes an obligation to operate the hall in a manner that is "nonarbitrary and nondiscriminatory." *Breininger* v. *Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 88 (1989). As the Board has

explained, "a labor organization must conform with and apply lawful contractual standards in the operation of the [hiring] hall and any departure from such standards which results in a denial of employment to an applicant for referral" constitutes the kind of "unfair, irrelevant, or invidious" treatment that violates the union's duty of fair representation, absent a showing that "the action was necessary for the effective performance of [the union's] function of representing its constituency." *International Union of Operating Engineers Local 406*, 262 N.L.R.B. 50, 57 (1982), enforced, 701 F.2d 504 (5th Cir. 1983).

Consistent with those principles, the Board reasonably found that the Union operated its exclusive hiring hall in an unlawful manner. Pet. App. 56-57. As the ALJ observed, "it is * * * impossible to find any objective criteria or standards for choosing among the qualified applicants" for job openings on the Rockford project (*id.* at 51-52); rather, "[w]hile the record shows that Manning and Galloway attempted to refer only qualified and dependable welders, at best a subjective test was used," with the result that "[q]ualified welders such as Harper and Flowers could not be considered because they were unknown to Galloway and Manning" (*id.* at 51). Similarly, the ALJ found, by operating its hiring hall as it did, the Union "discriminate[d] in favor of associates of Galloway and Manning" (*ibid.*), and "[e]mployees unknown to Manning, such as Harper and Flowers, would be excluded" from the pool of applicants eligible for dispatches "no matter how qualified" (*id.* at 53-54). The court of appeals sustained the Board's findings as supported by substantial evidence. *Id.* at 24. The court's fact-bound

holding raises no issue warranting further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. Petitioner contends that the decision of the court of appeals conflicts with this Court's decision in *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65 (1991). Pet. 9. Petitioner's contention is mistaken.

As the court of appeals explained (Pet. App. 20), "[a]t issue in *O'Neill* was a duty of fair representation challenge to the substantive provisions of a strike settlement," not a challenge to the union's operation of an exclusive hiring hall. Because "Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper *bargain* for that reached by the union," the *O'Neill* Court concluded that "[a]ny substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their *bargaining* responsibilities." 499 U.S. at 78 (emphasis added). In that context, the Court held that "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Id.* at 67 (internal quotation marks and citation omitted).

Nothing in *O'Neill* suggests that the same degree of deference is owed to a union's conduct in operating a hiring hall. As the court of appeals explained, in the hiring hall context, "the union has assumed the role of employer, as well as representative, and * * * the risk of judicial second-guessing of a negotiated

agreement that was of such concern to the Court in *O'Neill* is simply not present." Pet. App. 22.[3]

Petitioner similarly errs in contending (Pet. 10-11) that the court of appeals' conclusion is inconsistent with this Court's decision in *Breininger* v. *Sheet Metal Workers Int'l Ass'n Local Union No. 6, supra.* *Breininger* held that a union operating a hiring hall is not "relieved entirely of its duty of fair representation." 493 U.S. at 87. The Court explained that, in the hiring hall context, although referring workers to jobs "resembles a task that an employer might perform[,] * * * the union is administering a provision of the contract, something that we have always held is subject to the duty of fair representation." *Id.* at 88. The Court recognized, however, that, "if a union does wield additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power fairly *increases* rather than *decreases*." *Id.* at 89. *Breininger* thus supports the court of appeals' conclusion that, in view of a union's increased responsibility when it runs a hiring hall, the "highly deferential" test of *O'Neill*

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[3] Petitioner suggests (Pet. 11-12) that its authority in the hiring hall context was limited because "the contractor retained 'the right to reject any job applicant' " under the terms of the labor agreement between Rockford and the United Association. However, the Board made no findings with respect to how the contractual language was applied in actual practice. In any event, regardless of whether Rockford could have rejected a welder dispatched from the hiring hall, the opportunity for employment on the Rockford project depended on the applicant's ability initially to obtain a job referral from the union-operated hiring hall.

was not an appropriate standard for evaluating petitioner's conduct. See Pet. App. 22-23.[4]

3. Petitioner contends (Pet. 12) that review is warranted in this case because it "squarely present[s]" the "often mooted issue of Board jurisdiction over fair representation claims, unrelated to discrimination based on union membership."

First, contrary to petitioner's assertion, this case does not involve a duty-of-fair-representation claim "unrelated to discrimination based on union membership." Discrimination based on union "membership" includes that which encourages "participation in union activities" or encourages "adhesion to union membership." *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40 (1954) (NLRA allows "employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood," subject only to proviso to Section 8(a)(3), 29 U.S.C. 158(a)(3)). The court, in agreement with the Board, found that petitioner operated its exclusive hiring hall in so "subjective" a fashion that the system effectively

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[4] Even were petitioner correct that the "highly deferential" standard of *O'Neill* applied to this case, the Board nevertheless would have been entitled to enforcement of its order. As the ALJ found, Union officials Galloway and Manning used "at best a subjective test" for determining which rig welders to dispatch from the hiring hall, and the manner in which the hiring hall was operated effectively "discriminate[d] in favor of associates of Galloway and Manning," making it impossible for "[q]ualified welders such as Harper and Flowers [to] be considered" for referrals. Pet. App. 51. Such conduct in the operation of an exclusive hiring hall may be fairly said to lie "so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 499 U.S. at 67 (internal quotation marks and citation omitted).

"discriminate[d] in favor of associates of Galloway and Manning." Pet. App. 27-28. Such discrimination unlawfully encourages union "membership" as to all users of the hiring hall, for "the worker may easily suppose that it is necessary to curry [union officials'] favor to obtain referrals." *Local Union No. 277, Int'l Brotherhood of Painters* v. *NLRB*, 717 F.2d 805, 809 (3d Cir. 1983). Thus, the question whether the Board has jurisdiction over "an unadorned fair representation claim" (Pet. 12-13) is simply not presented by this case.

In any event, the decisions of this Court indicate that the Board has jurisdiction over duty-of-fair-representation claims generally. For example, in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), a discharged union member filed a suit in state court alleging that his union had breached its duty of fair representation by failing to exhaust contractual grievance procedures on his behalf "arbitrarily, capriciously and without just or reasonable reason or cause." *Id.* at 173. This Court held that the state court had jurisdiction to entertain the suit. The Court excepted such duty-of-fair-representation claims from the preemption principle of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). See 386 U.S. at 176-188. In reaching that conclusion, the Court did not suggest that state court jurisdiction was permissible because the Board had no jurisdiction over the claim. Instead, the Court's reasoning rested entirely on the proposition that, although the Board had asserted jurisdiction over unfair representation claims as unfair labor practices under the NLRA, see *id.* at 176-177, state court litigation of such claims was nonetheless permissible, see *id.* at 178-188. See also *Breininger*, 493 U.S. at 75 (applying *Vaca* to duty-of-

fair-representation claims arising out of the operation of union hiring halls). The reasonable implication of *Vaca* and *Breininger* is thus that the Board shares concurrent jurisdiction with the courts to hear duty-of-fair-representation claims, a view that has been uniformly adopted by the courts of appeals.[5] As there is no conflict among the circuits on the issue, further review is not warranted.

4. Petitioner also contends (Pet. 16) that the Board and the court of appeals were "wrong" to conclude that petitioner breached its duty of fair representation in the circumstances of this case, because, according to petitioner, its recruitment and dispatch system were "predicated on the work record and reputation for reliability of applicants" and was "actuated by a desire to refer only qualified and dependable workers." Petitioner's argument, however, is flatly contrary to the facts, as found by the Board and the court of appeals. The ALJ found that, "[w]hile the record shows that Manning and Galloway attempted to refer only qualified and dependable welders, at best a subjective test was used" (Pet. App. 51), and that "[there] is no evidence of what criteria, if any, Galloway used in referring employees" (*id.* at 53). The court agreed, finding that, "[w]hile the parties stipulated that [the Union] sought to refer 'competent

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[5] See, *e.g.*, *Branch 6000, Nat'l Ass'n of Letter Carriers* v. *NLRB*, 595 F.2d 808, 811 n.13 (D.C. Cir. 1979); *NLRB* v. *Local 282, Int'l Brotherhood of Teamsters*, 740 F.2d 141, 144-146 (2d Cir. 1984); *Newport News Shipbuilding & Dry Dock Co.* v. *NLRB*, 631 F.2d 263, 269-270 (4th Cir. 1980); *Kesner* v. *NLRB*, 532 F.2d 1169, 1173-1175 (7th Cir.), cert. denied, 429 U.S. 983, 1022 (1976); *Le'Mon* v. *NLRB*, 952 F.2d 1203, 1205 (10th Cir. 1991), cert. denied, 113 S. Ct. 93 (1992).

and reliable rig welders,' the record is devoid of any indication of [the Union's] methods for accomplishing this goal." *Id.* at 26-27. That case-specific finding does not warrant further review. *Universal Camera Corp.*, 340 U.S. at 490-491.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 95-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PLUMBERS AND PIPE FITTERS LOCAL UNION NO. 32, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The Board argues that this case involves claims alleging discrimination based on union membership. (Opp. Br. p. 12-13) This argument is disingenuous. It wholly ignores the issues as they were alleged, stipulated, tried and decided.

This case was tried under the theory that Local 32 "failed to dispatch the [charging parties] for arbitrary, capricious and invidious reasons." (R. 5-6)[1] The unfair labor practice complaint alleged that Local 32 operated its hiring hall in an unlawful manner by failing to publish its referral standards. (R. 11) The complaint further alleged that Local 32 "failed in its duty of fair representation." (R. 12) No other unfair labor practice was alleged. (R. 13, 262)

The NLRB General Counsel did not contend that Local 32 "discriminated against [Charging Parties] but rather that the arbitrary nature of the selection process breached the Union's duty of fair representation. . . ." (App. p. 47) Moreover, the parties

1. "R. ___" refers to the joint deferred appendix filed in the court below.

themselves stipulated that discriminatory conduct was neither "intended to be raised by the Complaint, pressed by General Counsel, nor intended by the parties to be litigated. . . ." (App. p. 70)

The parties further stipulated that Local 32 "accumulated the names of individuals who were good at this work, reliable, and did not have drinking or drug-related problems." (App. p. 66) The ALJ found that "the record shows that [Local 32] attempted to refer only qualified and dependable welders. . . ." (App. p. 51) Indeed, the results of the referral system bar any inference that only those who curried favor with Union officials were referred. As the parties stipulated and the ALJ found: (a) two members of Local 32 were dispatched as stewards but did not pass the welding

test. Hence, no "members of [Local 32] worked as welders on the job" (App. p. 46-47, 68); (b) no rig welders from the state of Washington were dispatched (App. p. 47, 68); (c) five rig welders out of the total of the 15 dispatched were from Bakersfield, California Local 460 -- Charging Party Flowers' home local union. (R. 151, 39-342)

The ALJ concluded that Local 32 violated the NLRA by failing to use objective criteria and standards when referring rig welders. (App. p. 56-57) Consistent with the issues litigated, it made no finding regarding discrimination based upon union membership or activity. (App. p. 56-57) The Board affirmed. (App. p. 56)

The court below stated that the Board's General Counsel filed an unfair labor practice complaint "casting the

alleged unfair labor practice as a breach of the duty of fair representation." (App. p. 9-10) The court further stated that the "General Counsel's complaint did not allege specific discrimination in favor of the union's own members or against [the Charging Parties], but 'rather that the arbitrary nature of the selection process breached the Union's duty of fair representation. . . .'" (App. p. 29; citation omitted.) The court enforced the Board's decision. (App. p. 32)

This Court has repeatedly reserved the recurring question of Board jurisdiction over fair representation cases in cases devoid of allegations of discrimination on account of union membership. (See, e.g., DelCostello v. Teamsters, 462 U.S. 151, 170 (1982)) This case squarely presents an "unadorned

fair representation claim." (Pet. Opening Br., p. 12-13) Whether the Board has jurisdiction to adjudicate an alleged breach of the duty of fair representation where, as here, there is no claim of discrimination based on union membership or activity is ripe for review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED this 20th day of October, 1995.

Respectfully submitted,

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